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In the

Supreme Court of the United States

OCTOBER TERM, 1970

70-77

No. 1325

STATE OF NORTH CAROLINA,

Petitioner

v.

WAYNE CLAUDE RICE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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No.

STATE OF NORTH CAROLINA,

Petitioner

v.

WAYNE CLAUDE RICE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, the State of North Carolina, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit in the case of WAYNE CLAUDE RICE v. STATE OF NORTH CAROLINA filed November 16, 1970.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit filed November 16, 1970, is not yet reported and is printed as Appendix A to this Petition (A pp 10-16).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

DOES THE IMPOSITION OF A GREATER SENTENCE UPON JURY TRIAL AND CONVICTION WHEN THE ACCUSED EXERCISED HIS UNFETTERED AND ABSOLUTE RIGHT TO A TRIAL DE NOVO BEFORE A JURY IN THE SUPERIOR COURT UPON "APPEAL" FROM THE STATE DISTRICT COURT, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Wayne Claude Rice was arrested on July 2, 1968, on a charge of driving under the influence of alcohol. He was tried in the General County Court of Buncombe County, North Carolina, on July 19, 1968, at which time he entered a plea of not guilty. He was found guilty and sentenced to a term of nine months imprisonment which was suspended upon payment of a fine of $100.00 and costs. Thereupon, Rice "appealed" the County Court Judgment to the Superior Court of Buncombe County for trial *de novo* pursuant to North Carolina General Statutes §§ 15-177 and 15-177.1, which is now provided for in North Carolina General Statute 7A-290 under North Carolina's new District Court system:

> "In all cases of appeal to the Superior Court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and *de novo* by a jury, without prejudice from the former proceedings

of the court below, irrespective of the plea entered or the judgment pronounced thereon." N.C.G.S. 15-177.1.

"Any defendant convicted in a District Court before the magistrate may appeal to the District Court for a trial *de novo* before the District Court Judge. Any defendant convicted in a District Court before the Judge may appeal to the Superior Court for trial *de novo*. . . ." N.C.G.S. 7A-290.

On August 2, 1968, Rice was tried before a jury in the Buncombe County Superior Court, found guilty of driving under the influence of alcohol and sentenced to a term of two years. He did not appeal the conviction and sentence. However, he thereafter filed a Petition for post conviction review in the Buncombe County Superior Court under the provisions of the North Carolina Post Conviction Hearing Act, N.C.G.S. 15-217, et seq. From an Order entered October 30, 1968, denying post conviction relief, Rice filed a Notice of Appeal to the North Carolina Court of Appeals. On November 22, 1968, he withdrew that appeal, and did not file a Petition for Writ of Certiorari to the North Carolina Court of Appeals, N.C.G.S. 15-222, until after the decision of the Federal District Court, *infra*. On December 11, 1968, Rice filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of North Carolina which was denied on December 23, 1968, by Chief Judge Woodrow W. Jones upon the ground that Rice had failed to exhaust his available State remedies. Upon Rice's appeal to the United States Court of *Appeals for the Fourth Circuit*, it was held that ". . . the District Court was in error in dismissing for Rice's failure to complete the remedies available to him in the State court. It would have been futile . . .", and stated "on the strength of PEARCE (NORTH CAROLINA v. PEARCE, 395 U. S. 711 (1969)), we again see the more drastic sentence on the second trial as a denial of Federal due process . . ." The Court concluded its opinion by stating that ". . . the court is not insensi-

tive to the logical and persuasive argument to the contrary in LEMIEUX v. ROBBINS, 414 F. 2d 353 (1 Cir. 1969), cert. dnd. 397 U. S. 1017 (1970). Likewise we express deference to the opinion in EVANS v. CITY OF RICHMOND, 210 Va. 403, 171 S.E. 2d 247 (1969). *We simply disagree.*" (Emphasis added.) Concluding that the sentence imposed upon Rice by the Judge of the Superior Court was a denial of Federal due process, the Fourth Circuit Court of Appeals directed that ". . . Rice is not to be held to his conviction. He was completely discharged by North Carolina on January 24, 1970, but this did not moot the case on habeas corpus. Injurious consequences because of the conviction might still obtain. *We think Rice is entitled to expunction of the record of them.*" (Emphasis added.)

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN RICE v. NORTH CAROLINA CONFLICTS WITH THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IN LEMIEUX v. ROBBINS, 414 F. 2d 353 (1 Cir. 1969), cert. dnd. 397 U. S. 1017 (1970).

In reliance upon what it conceived to be the principles established in NORTH CAROLINA v. PEARCE, 395 U. S. 711 (1969), the Fourth Circuit has here held that the imposition of a greater sentence upon the exercise of the unfettered right of trial *de novo* is a denial of Federal due process. The decision of the Fourth Circuit Court of Appeals in RICE is in conflict with the decision of the First Circuit Court of Appeals in LEMIEUX v. ROBBINS, *supra*. In deciding RICE, the Fourth Circuit stated "we simply disagree" with the holding of the First Circuit in LEMIEUX, with which it is in direct conflict. While acknowledging the "logical and persuasive argument to the contrary in LEMIEUX", the Fourth Circuit declined to follow the First Circuit's reasoning. The Fourth Circuit also disagreed with the opinion of the Supreme Court of Virginia in EVANS v. CITY OF RICH-

MOND, 210 Va. 403, 171 S.E. 2d 247 (1969). In concluding that PEARCE was applicable, the Fourth Circuit also disagreed with the Supreme Court of North Carolina. STATE v. SPENCER, 276 N.C. 535, 173 S.E. 765 (1970); STATE v. SPARROW, 276 N.C. 499, 173 S.E. 2d 897 (1970). See n. 1. (A p 13). The Fourth Circuit also failed to cite the decision of the Supreme Court of Michigan to the contrary. MICHIGAN v. OLARY, 382 Mich. 559, 170 N.W. 2d 842 (1969). Moreover, the Supreme Court of Maine in LEMIEUX v. MAINE, 240 A. 2d 202 (Me. 1968) and the Supreme Court of Nebraska in STATE v. STANOSHECK, 186 Neb. 17, 180 N.W. 2d 226 (1970), are also contrary to the position taken by the Fourth Circuit in RICE.

These conflicts justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW RAISES SERIOUS PROBLEMS AFFECTING THE STRUCTURE OF CRIMINAL JUSTICE IN A SIGNIFICANT NUMBER OF JURISDICTIONS.

The decision below should be reviewed because it erroneously applies the holding of NORTH CAROLINA v. PEARCE, *supra*, to a situation not intended by this Court. In PEARCE, the Appellant was tried and sentenced in a State Superior Court. His conviction was reversed on appeal after a successful attack on constitutional grounds and he was retried in the same Superior Court. Thus, he was clearly retried in a second court of record and of equal dignity with the court which held his first trial. The language of this Court in PEARCE implies that the principle enunciated should be limited to the facts of that case. The problem before this Court concerned "the constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon *retrial*." 395 U.S. at 716. Or, as otherwise stated, "what constitutional limitations there may be upon the general power of a judge to impose *upon reconviction* a longer prison sentence than the

defendant originally received." 395 U.S. at 719. The Court also refers to "a man who is *retried after his first conviction has been set aside . . .*" 395 U.S. at 722. RICE was not required to attack his conviction or sentence in the General County Court (now District Court), or seek a reversal since trial *de novo* in the Superior Court is an absolute right even when the defendant pleads guilty in the lower court. N.C.G.S. 15-177.1; N.C.G.S. 7A-290.

The type of case to which the PEARCE holding applies is obviously one which began in the Superior Court, was appealed to an appellate court, and a new trial awarded *on a point of law*. The reversal and remand for a new trial usually involves an overruling of a trial judge on a point of law. In the present case, the "appeal" to the Superior Court for trial *de novo* is a matter of right and does not involve an overruling of a trial judge on a point of law. It must also be pointed out that the inferior court is not a court of record. Therefore the Petitioner submits that the case at bar does not fall under the dictates of the PEARCE case.

North Carolina District Courts do not provide for jury trials and transcripts are not available in criminal cases. They are not courts of record. The Superior Court in North Carolina tries the defendant *de novo* from the beginning to the end on both the law and the facts, without regard to the plea, trial, verdict, or judgment in the inferior court. When an appeal of right is taken to the Superior Court, the case is, in the eyes of the State, ". . . originally brought therein, . . . upon questions of law and fact, the judgment appealed from is completely annulled and is not thereafter available for any purpose." STATE v. GOFF, 205 N.C. 545, 172 S.E. 407 (1934); STATE v. ANDERSON, 5 N.C. App. 614, 615, 196 S.E. 2d 38 (1969).

The system of dual levels of court in which the defendant charged with a less serious offense is initially tried in an inferior court before a judge (in North Carolina this includes traffic offenses, disorderly persons violations and misdemeanors), is

also in effect in at least twenty-three other states, and possibly more than presently revealed in our research.[1] If the Fourth Circuit's opinion in RICE stands, North Carolina, together with Arizona, Arkansas, Colorado, Florida, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraka, Nevada, New Hampshire, New Mexico, North Dakota, Texas, Utah, Virginia and Washington, will all be required to completely revise their judicial systems. It holds the promise of converting lower criminal trial courts, which now handle the vast number of misdemeanor and other offenses within their jurisdiction and alleviate court congestion by determining cases which do not require jury trials,[2] into mere stepping stones to superior courts

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1. ARIZONA—A.R.S. § 22-374; ARKANSAS—Ark. Stat. §§ 44-501, 502 and 509; COLORADO—Rule 37(f) Colo. Rules of Crim. Pro.; FLORIDA—Constitution of Florida, Art. V, §§ 11(2) and 6(3). See also F.S.A. §§§ 932.53, 54, 55 and 56; INDIANA—Burns' Ind. Stat. Ann. § 9-721. See also PEELE v. STATE, 161 Ind. 378, 68 N.E. 682, and HARLAN v. STATE, 190 Ind. 332, 130 N.E. 413; KANSAS—K.S.A. § 22-3610. See also STATE v. COULTER, 40 Kan. 87, 19 P. 368 (1888), and STATE v. FORNER, 32 Kan. 281, 4 P. 357 (1884); KENTUCKY—K.R.S. § 23.032 and Rule 12.06 Ky. Rules of Crim. Pro. See also DRESSMAN v. COMMONWEALTH, 204 Ky. 668, 265 S.W. 3 (1924); MAINE—Me. Rules of Crim. Pro., Dist. Ct. Rules 37(a) and 39(a), (b) and (c). See also LEMIEUX v. MAINE, 240 A. 2d 206 (Me. 1968) and LEMIEUX v. ROBBINS, 414 F. 2d 353 (1st Cir. 1969), cert. dnd. 397 U.S. 1017 (1970); MARYLAND—Baltimore City Municipal Code (Art. 5 § 43, Ann. Code of Md., Vol. I, 1968 Replacement Vol.) and Art. 52 § 13(b), Ann. Code of Md., Vol. 5, 1968 Replacement Vol. See also Art. 26 § 156, Ann. Code of Md. Vol. 2. 1966 Replacement Vol., 1970 Cumm. Supp.; MICHIGAN—PEOPLE v. OLARY, 382 Mich. 559, 170 N.W. 2d 842 (1969); MINNESOTA—M.S.A. § 488.20 and §§§ 633.20, 21 and 22; MISSISSIPPI—Miss. Code §§ 1201 and 1202; MISSOURI—Supreme Court Rule '22 §§ 10 and 11; MONTANA—R.C.M. § 95-2009. See also WHITE SULPHUR SPRINGS v. VOISE, 136 Mont. 1, 343 P. 2d 855 (1959); NEVADA—Rule 76 Justices' Court Pro.; NEW HAMPSHIRE—STATE v. DESPRES, 107 N.H. 297, 220 A. 2d 758 (1966). See also N.H.R.S.A. §§§ 502.18, 502A:11 and 12, and 599:1; NEW MEXICO—N.M.S.A. § 36-15-3(A); NORTH DAKOTA—N.D. Cent. Code §§ 33-12-40 and 41; TEXAS—Vernon's Ann. Code of Crim. Pro. §§ 44.17 and 45.10; UTAH—Utah Code Ann. §§ 78-4-17 and 78-5-14. See also Utah Code Ann. §§ 77-57-43 and 77-27-2; VIRGINIA—Va. Code § 16.1-136. See also EVANS v. CITY OF RICHMOND, 210 Va. 403, 171 S.E. 2d 247 (1969); WASHINGTON—R.C.W. §§ 3.50.280 and 3.50.410. See also STATE v. HAGIMORI, 57 Wash. 623, 107 P. 855 (1910).

2. For example, according to data supplied by the Administrative Office of the Courts for the State of North Carolina*, for the 1969 calendar year, the last year for which complete information is available, the Superior Courts of 83 of the 100 counties of this State tried 25,840 criminal cases, of which 15,765 were trials *de novo* from the District Courts. In other words, 61.0% of all criminal trials in the Superior Courts of North Carolina were upon trial *de novo*.

for criminal defendants charged with misdemeanor and other inferior offenses. These defendants will have everything to gain and nothing to lose as they congest already crowded superior court criminal calendars and frustrate all efforts to implement the constitutional mandate of speedy trial in the criminal trial courts.

CONCLUSION

The decision of the Fourth Circuit in the application of the PEARCE doctrine in this case extends well beyond the intent of this Court. It is clear that this Court's holding in PEARCE did not envision the factual situation of the case at bar. The case at bar is governed by a statutory procedure and is not the type of "new trial" to which the holding in PEARCE applies. Therefore, in view of the conflict of decisions between the First Circuit Court of Appeals in LEMIEUX v. ROBBINS, and the Fourth Circuit Court of Appeals in RICE v. NORTH CAROLINA, the decisions of the highest courts of many of the states, and the effect upon the administration of criminal justice in at least twenty-three states, it is respect-

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During 1969, the District Courts of the 83 counties in which the new District Court system had already been implemented, tried 334,747 cases, of which 15,765 were "appealed" for trial *de novo* in the Superior Court. (The figure of 334,747 includes only cases which were actually tried; and excludes cases disposed of by waiver, preliminary hearing, nol pros or otherwise.) Of the cases tried in the District Courts, 4.71% were "appealed" to the Superior Court for trial *de novo*.

Using the 1969 statistics as an indicator, it is possible to project the impact upon the Superior Court of any increase in the number of cases "appealed" from the District Courts for trial *de novo*. An increase of one percent in the number of cases "appealed" from the District Courts would add 3,348 cases to the Superior Court criminal docket. An addition of 3,348 cases constitutes an increase of 13 percent in the Superior Court docket. The ratio between an increase in cases "appealed" from the District Court and the consequent increase in the Superior Court criminal docket is one to thirteen. *If cases "appealed" from the District Court increased by five percent, the caseload of the Superior Court would increase by 65 percent; if the cases "appealed" from the District Court increased by 10 percent, the caseload of the Superior Court would increase by 130 percent.*

* This data is taken from the Annual Report of the Administrative Office of the Courts, 1969, and from reports submitted to the Administrative Office by the Clerks of Superior Court. These statistics relate to the 1969 calendar year and cover only the 83 counties of the State then under the District Court system. On December 7, 1970, the remaining 17 of the State's 100 counties came under the new District Court system.

fully submitted that this case is of sufficient importance that this Court exercise its jurisdiction and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Appendix A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 13,074

Thurman E. Wood,

Appellant,

v.

Maj. Fred Ross, Supt. of
Caledonia Prison Farm,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. John D. Larkins, Jr., District Judge.

No. 13,425

Wayne Claude Rice,

Appellant,

v.

State of North Carolina,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W. Jones, District Judge.

(Argued May 8, 1970 Decided November 16, 1970.)

Before Bryan and Craven, Circuit Judges, and Russell, District Judge.

William W. Van Alstyne (Court-assigned counsel) for Appellants, and Edward L. Eatmen, Jr., Staff Attorney, Office of the Attorney General of North Carolina, (Robert Morgan, Attorney General of North Carolina, and Jacob L. Safron, Staff Attorney, Office of the Attorney General of North Carolina, on brief) for Appellee.

Albert V. Bryan, Circuit Judge:

These are common appeals in habeas corpus aimed at the *ultimate* convictions in North Carolina record courts of Wayne Claude Rice and Thurman E. Wood. They assert that in the review allowed them by the State from their *primary* convictions in courts not of record, each experienced unconstitutional overreaching by the State. Both claim they were denied due process, in that they were given harsher punishments on the appeals than in their initial trials. Additionally, Wood argues that he was put in double jeopardy. In our judgment appellants should prevail.

THE WOOD CASE

Wood pleaded guilty, July 19, 1962, and was given the maximum sentence of two years, in the Recorder's Court of the City of Dunn, North Carolina on a *misdemeanor* charge of breaking and entering *without* intent to commit a felony. N. C. Gen. Stat. 14-54. Wood appealed to the Superior Court as permitted by the organic statutes which also provide for a de novo trial. GS 7-230 and 15-177.1.

At the term commencing in August, 1962, Wood was indicted for the same act by a grand jury, but this time for a *felony*—namely the offense of breaking and entering *with* criminal intent. GS 14-54. Again he pleaded guilty but this time he was

ordered to serve 10 years imprisonment, with five years suspended on probationary conditions. GS 14-2. On October 15, 1965, this grace was forfeited, but on March 15, 1966 the Governor of North Carolina commuted the sentence to five years.

For relief, post-conviction remedies and habeas corpus were pursued in the Superior and Supreme Court of North Carolina on the contention that the due process clause of the Fourteenth Amendment forbids the augmenting of punishment on appeal beyond the penalty imposed at the first trial, citing Patton v. North Carolina, 381 F2d 636, 638-41 (4 Cir. 1967), cert. denied 390 US 905 (1968). Failing in the State tribunals, Wood petitioned the Federal District Court of Eastern North Carolina for release on habeas corpus. In replication, the State contended that *Patton* was distinguishable on the premise that there the appeal was simply a continuation of the first case, while here the second proceeding was a new and different cause.

The District Court refused relief October 17, 1968 and this order is the predicate of the instant appeal. Stout precedent for its view is found in State v. Morris, 275 NC 50, 165 SE2d 245, 252 (1969) and State v. Tolley, 271 NC 459, 156 SE2d 858, 860 (1967). These declare that since in North Carolina the appeal from the inferior to the higher court is de novo, the latter was at liberty to punish to the limit of the statute, unrestricted by the first judgment.

Notwithstanding the force of the decisional law adopted by the District Court, we cannot accept its conclusion that there was no violation of due process in the imposition here of a harsher sentence when the accused exercised his legal right to appeal. The review is a privilege granted by the State and cannot, compatibly with due process, be encumbered.

Our position was first and fundamentally stated in *Patton*, supra, 381 F2d at 638-41. Its logic is not dislodged by terming the second trial here as a totally independent and discrete proceeding. In both trials the misconduct to be punished was

identical. The penalty cannot be expanded merely because of redetermination of guilt.

While North Carolina v. Pearce, 395 US 711 (1969) had not come down at the time of the District Court's decision, its reasoning is now available.[1] There the Court accepted the due process rationale of *Patton*. Nevertheless, the Court modified the *Patton* doctrine that in no event could a sentence be increased on appeal. Instead, the Court concluded that a more stringent sentence on the second trial constitutes withdrawal of Federal due process when there is no proof of intervening detrimental deportment. Id. at 723-26.

The present lack of such proof compels the conclusion that Wood suffered a denial of due process. He was exercising the only avenue afforded to review his conviction. Like the defendants in *Pearce*, Wood had the right to appeal free of the fear of reprisal on the part of the sentencing judge. Id. at 725. No distinction can be drawn between the appellant's right in the two cases.

Wood's appeal irrevocably erased his conviction in the lower court. "'. . . [W]hen appeals are taken from a justice's court upon questions of law and fact, the judgment appealed from is completely annulled, and *is not thereafter available for any purpose.*' (Emphasis added.) State v. Goff, 205 N.C. 545, 172 S.E. 407." State v. Anderson, 5 NC App. 614, 169 SE2d 38, 39-40 (1969). Hence, Wood could be tried solely on the appeal, but only then with assurance of no enhancement of punishment in the event of another conviction without proof of supervening misconduct. This assurance was violated by the State and so his conviction on appeal as well as his first conviction falls.

Our holding that the State cannot with due process punish

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1. Notably, after oral argument in this case, the Supreme Court of North Carolina held that *Pearce* does not apply to de novo trials resulting from appeals of convictions entered in non-record courts. See State v. Spencer, ____NC____, 173 SE2d 765, 772 (May 13, 1970); State v. Sparrow, ____NC ____, 173 SE2d 897, 903 (May 13, 1970).

Wood on appeal more heavily than he was originally charged, discloses too that he suffered double jeopardy. This is because the charge against him was increased after he had been tried for an offense consisting of an essential element of the greater offense. That is to say, he had been tried for breaking and entering, and then the State tried him for a felony in which breaking and entering was an indispensable element. Cf. Waller v. Florida, 397 US 387 (1970).

The Fifth Amendment, of course, provides "nor shall any person be subject for the *same offense* to be twice put in jeopardy of life or limb". (Accent added.) This prohibition applies to the States. Benton v. Maryland, 395 US 784 (1969). Thus, again, the conviction of Wood is seen to be vitiated. Cf. Price v. Georgia, 398 US 323 (1970); Green v. United States, 355 US 184 (1957); Grafton v. United States, 206 US 333, 350 (1907); Dove v. Peyton, 343 F2d 210, 214 (4 Cir. 1965); Ekberg v. United States, 167 F2d 380, 386 (1 Cir. 1948).

Finally, we note that Wood was released on June 23, 1970 as having completed the five-year sentence. Habeas corpus is thus no longer needed to relieve his detention. Nevertheless, his claims for relief are not mooted. Sibron v. New York, 392 US 40, 55 (1968). He is entitled to a declaration that his convictions were of no effect and preclude consequences which might otherwise result. Hewett v. North Carolina, 415 F2d 1316, 1321-22 (4 Cir. 1969).

Accordingly, we direct issuance of the writ with complete cancellation of the record of his convictions, for the State defeated his right of appeal and it cannot now justly recapture or retry him.

THE RICE CASE

Rice was arrested on July 2, 1968 for driving while intoxicated on a North Carolina State highway. GS 20-138. After trial in the General County Court of Buncombe County on July 19, 1968 upon a plea of not guilty, Rice was convicted and sen-

tenced to imprisonment for nine months, with suspension of execution upon the payment of a fine of $100.00 and costs. On appeal to the Superior Court of the County, he was found guilty and commited to two years imprisonment.

State post-conviction steps failed. He appealed to the North Carolina Court of Appeals, but withdrew his petition and applied to the Federal District Court for Western North Carolina to be discharged on habeas corpus. The argument advanced by Rice there was that the State statute conferred upon him the right of appeal, and that enlargement of the punishment clearly ignored the Federal due process announced in our decision in Patton v. North Carolina, supra, 381 F2d 636.

The District Judge denied the application for habeas corpus on December 23, 1968, for Rice's failure to exhaust his State remedies. The omission was the appeal to the State Court of Appeals. The ruling of the District Court refusing the writ is the subject of this appeal.

We think the District Court was in error in dismissing for Rice's failure to complete the remedies available to him in the State court. It would have been futile. Concededly the Supreme Court of North Carolina had consistently refused to follow *Patton*. State v. Morris, 275 NC 50, 165 SE2d 245 (1969); State v. Stafford, 274 NC 519, 164 SE2d 371 (1968); State v. Tolley, 271 NC 459, 156 SE2d 858 (1967). In these circumstances, exhaustion of State remedies is not indispensable. Hayes v. Boslow, 336 F2d 31, 32 (4 Cir. 1964); cf. Wright v. Maryland Penitentiary, ... F2d ..... (4 Cir. June 23, 1970).

On the merits, we reach the same conclusion as we did in Wood's appeal. While the District Judge went no further than to dismiss the appeal for non-pursuit of State remedies, the grounds for relief still asserted by Rice parallel those of Wood. As in *Wood*, the record reveals nothing which warrants the increased punishment. On the strength of *Pearce*, we again see

the more drastic sentence on the second trial as a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal.

The upshot is that for the reasons stated in *Wood*, except the double jeopardy ground, Rice is not to be held to his conviction. He was completely discharged by North Carolina on January 24, 1970 but this did not moot the case on habeas corpus. Injurious consequences because of the convictions might still obtain. We think Rice is entitled to expunction of the record of them.

In today's decisions, the court is not insensitive to the logical and persuasive argument to the contrary in Lemieux *v.* Robbins, 414 F2d 353 (1 Cir. 1969), cert. denied 397 US 1017 (1970). Likewise we expresse deference to the opinion in Evans v. City of Richmond, 210 Va. 403, 171 SE2d 247 (1969). We simply disagree.

Reversed with directions.